

Editor's note: Reconsideration denied by Order dated Jan. 20, 1988

KENNETH W. BOSLEY

IBLA 86-321; IBLA 86-322

Decided October 29, 1987

Appeals from decisions of the District Manager, California Desert District, Bureau of Land Management, notifying interested parties that a parcel of public land would be offered for direct sale and rejecting a right-of-way application for a wind farm. CA 17303, CA 17631.

IBLA 86-321 dismissed; decision appealed in IBLA 86-322 affirmed.

1. Federal Land Policy and Management Act of 1976: Sales-- Rules of Practice: Appeals: Effect of -- Rules of Practice: Protests

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

2. Rules of Practice: Appeals: Effect of -- Rules of Practice: Protests

An "appeal" of action proposed to be taken by BLM is a protest, and where that protest contains absolutely no reason for objection to the proposed action, BLM may summarily dismiss the protest. Where the protest is subsequently forwarded to the Board for review as an appeal, the "appeal" will be dismissed because to treat the protest as an appeal and to allow a protestant to present his objections to the proposed action for the first time on appeal would put the Board in the position of being the initial decisionmaker and would frustrate the Departmental framework for decisionmaking.

3. Federal Land Policy and Management Act of 1976: Sales-- Public Sales: Bidding

BLM may properly decide to make a direct sale of an isolated parcel of public land to an existing grazing user, who is also one of the adjoining landowners, rather than engage in regular or modified competitive

bidding, under sec. 203(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(f) (1982).

4. Federal Land Policy and Management Act of 1976: Rights-Of-Way
-- Rights-Of-Way: Applications

Under the regulations governing right-of-way applications, the authorized officer may require the applicant to submit additional information as he deems necessary. Also, the authorized officer is required to issue a deficiency notice when he finds the information supplied is incomplete or not in conformance with the law. However, the authorized officer is not required to request further information prior to issuance of a deficiency notice.

5. Federal Land Policy and Management Act of 1976: Rights-Of-Way
-- Rights-Of-Way: Applications

A right-of-way application for a wind farm is a request for a non-linear right-of-way, and, therefore, processing fee requirements are governed by 43 CFR 2803.1-1(a)(3)(ii). Where BLM requests submission of additional fees to cover processing costs for such a non-linear right-of-way, and the applicant fails to pay such fees, a BLM decision rejecting the application for failure to make additional payment will be upheld on appeal.

APPEARANCES: Kenneth W. Bosley, Sparks, Maryland, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The two appeals, consolidated herein for decision because of the interrelated factual circumstances, involve the direct sale of a 1,049.77-acre tract of public land (CA 17303) to Alexander Haagen, III, pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982), and the right-of-way application of Kenneth W. Bosley (CA 17631) for a wind farm on some of those same lands.

Factual Background of IBLA 86-321

The direct sale lands, described by the Bureau of Land Management (BLM), as parcel No. SD-7, are situated in portions of secs. 5 through 8, 17 and 18, T. 18 S., R. 7 E., San Bernardino Meridian, San Diego County, California, and embrace Rattlesnake Mountain. ^{1/} The record indicates that as early as February 1985 BLM was contemplating the sale of much of the same land, then

^{1/} The subject land is more particularly described as follows:

SW 1/4 NW 1/4, NW 1/4 SW 1/4 sec. 5; S 1/2 NE 1/4, E 1/2 SE 1/4 sec. 6; E 1/2 NE 1/4, NW 1/4 NE 1/4, E 1/2 NW 1/4, E 1/2 SE 1/4, SW 1/4 SE 1/4 sec. 7; W 1/2 SW 1/4 sec. 8; lots 5-8, N 1/2 NE 1/4, N 1/2 NW 1/4 sec. 17; NE 1/4 sec. 18.

described by BLM as parcel 33. 2/ At that time, BLM prepared a "Mineral Development and Surface Interference Report" regarding the sale of parcel 33 and neighboring parcel 19, which report, at page 2 of 4, recommended that the parcels "be offered for sale." By letter dated April 12, 1985, Haagen expressed interest in purchasing the two parcels, for which he had held grazing leases for many years. He represented that the lands were necessary for his continuing grazing operation.

In June 1985, BLM prepared an Environmental Assessment (EA) which assessed the environmental impact of a proposed direct sale, at appraised fair market value, of eight parcels of land, including parcel 33, and a no action alternative. 3/ In an untitled, undated document attached to the EA, seven parcels of land identified as parcel Nos. LA-1 and SD-2 through SD-7, were described as "scattered, isolated parcels of public land no longer deemed suitable for continued Federal management." That document recommended that the proposed direct sales be consummated:

None of these parcels [was] acquired for a specific purpose and their location and restricted access, as well as being surrounded by private land and their small size in some cases, make these lands difficult and uneconomical to manage. The disposal of these parcels will serve important public objectives such as disposing of lands too isolated for cost-effective resource management by the BLM or any other Federal department or agency.

On June 25, 1985, the Acting District Manager, California Desert District, BLM, signed a "Notice of Realty Action" (NORA) which notified interested parties that parcel No. SD-7 and six other parcels would be offered for direct sale "60 days after the date of this notice." 4/ The June 1985 notice set forth the appraised fair market values of the parcels, 5/ provided for payment of the purchase price,

2/ Parcel 33 contained the same land as in parcel No. SD-7, with the exception that parcel 33 included the NW 1/4 SE 1/4 sec. 5, instead of the NW 1/4 SW 1/4 sec. 5, and also included lots 11 and 12 sec. 18.

3/ The document explained the basis for the proposed direct sale of the subject parcels:

"The decision to dispose of the subject lands via direct sale was determined pursuant to 43 CFR 2711.3-3. This decision was arrived at after considering historic and current land uses of the area; valid, existing rights or encumbrances [sic] of record, i.e., mining claims and grazing leases; land ownership patterns and access to these parcels of public land."

4/ The June 1985 notice stated that the parcels would be offered for sale on Sept. 4, 1985. BLM subsequently amended the notice on July 26, 1985, to change the sale date to Sept. 24, 1985, in order to "ensure adequate public notice in the general vicinity of the direct sale parcels." 50 FR 31254 (Aug. 1, 1985).

5/ Parcel No. SD-7 was valued at \$50,000 in an "Appraisal Report," signed by a BLM appraiser on Feb. 25, 1985, and approved by the Acting District Manager on Apr. 1, 1985.

with 10 percent to be paid on the sale date and the remainder within 60 days thereafter, and set forth the terms and conditions of the sale. Finally, the June 1985 notice stated:

For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments to the District Manager at the above address. Objections will be reviewed by the State Director, who may sustain, vacate, or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of Interior.

On July 2, 1985, the June 1985 notice was published in the Federal Register. 50 FR 27365 (July 2, 1985). The notice was also published in the Daily Californian, a newspaper of general circulation, on July 25 and August 1 and 8, 1985. On August 22, 1985, Bosley filed with BLM a letter which simply stated: "This is an appeal of CA 17303, SD-7, Non-competitive Direct Sale to Alexander Haagen, of Haagen Development, Los Angeles." Bosley included no reasons in support of his "appeal."

BLM responded to appellant by letter dated September 4, 1985, in which it stated:

On August 22, 1985, the California Desert District Office received your letter "appealing" the Bureau's proposed direct land sale to Mr. Alexander Haagen III. The BLM, through publication of a Notice of Realty Action (Serial No. CA 17303), provided a 45-day period during which the public may express any written comment or concern regarding the subject sale. The comment period ended on August 16, 1985. Your letter arrived late and failed to include any specific comment(s) concerning the proposed direct sale. Your statement "This is an appeal of CA 17303, SD-7, non-competitive sale to Alexander Haagen . . ." is not sufficient enough reason to vacate or modify the proposed direct sale to Mr. Haagen.

If you have any substantive comments regarding the subject direct sale, you may wish to contact our State office in Sacramento, California.

This letter was sent certified mail and received at Bosley's address on September 12, 1985. There is nothing in the record to indicate that Bosley took advantage of the opportunity to file substantive comments with the BLM State Office.

On September 24, 1985, BLM received from Haagen payment of 10 percent of the purchase price of parcel No. SD-7. However, issuance of a patent has been held in abeyance pending resolution of Bosley's appeals.

By memorandum dated February 3, 1986, BLM transmitted the case file with respect to CA-17303 to the Board. This case was docketed as IBLA 86-321.

Factual Background of IBLA 86-322

On June 21, 1985, prior to the Acting District Manager's June 1985 decision to proceed with the direct sale of parcel No. SD-7, Bosley filed a right-of-way application (CA-17631) for a wind farm, pursuant to section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982). He sought all of the public land in secs. 5 through 8, 17 and 18, T. 18 S., R. 7 E., San Bernardino Meridian, San Diego County, California, for a right-of-way in "perpetuity." As described in the application, the wind farm would consist of 76 "units," each with a 68-foot diameter rotor on a 160-foot tubular tower, and an associated 69 KV substation. The proposed siting of the turbines was set forth on attached maps of the area. The application, however, stated that the "exact number and specific placement of turbines will be directed by continuing meteorological studies." Along with the application, Bosley submitted a check for \$500 in payment of the application fee.

By interlocutory decision dated August 14, 1985, BLM notified Bosley that his right-of-way application was being held "in abeyance" until the submission of additional "processing fees" and other documents. BLM required such submission within 30 days from receipt of the decision. BLM specifically required Bosley to submit an additional \$4,250, 6/ a detailed narrative description of the proposed wind farm, including "construction, operation and maintenance of wind turbine sites, distribution lines, meters, roads and any ancillary facilities," "site-specific plot(s) and illustrations" showing the location of such facilities, a discussion of alternative sitings considered, copies of local permits or proof that such permits were not necessary, a statement of need and economic feasibility, and a statement of the environmental, social and economic impact of the proposal. In each case, BLM cited the appropriate regulation which purportedly supported its required submission.

Bosley submitted additional information to BLM on September 17, 1985, in support of his right-of-way application. In a cover letter dated September 11, 1985, he described that information as a revised site map, a brief narrative description of the proposed wind farm, a brief statement of need, and a brief reference to the environmental, social, and economic impact of the proposal. Bosley implied that his response was limited because BLM had not let him go on the land or see relevant "government records." He also noted that he had scaled back his original proposal:

I have modified my original plot plan from many miles of far spaced wind turbines to one row of closely spaced wind turbines located in the strongest wind. BLM mistook these rows as an area

6/ Despite Bosley's statement in his application that he was seeking a right-of-way for "all" of the lands in the sections described therein, the record indicates that BLM calculated the total processing fee of \$4,750 by taking the total number of acres (750 acres) depicted as the area required for the siting of appellant's wind turbines on maps attached to appellant's right-of-way application multiplied by \$250 for each 40 acres or portion thereof, in accordance with 43 CFR 2803.1-1(a)(3)(ii).

right-of-way instead of linear. Since this modification my application fee is several hundred dollars too much. The current plot plan is comprised of several miles of wind turbines, a road, and power line together as a ribbon. A small substation will put power into an upgraded local distribution system.

In his October 16, 1985 decision, the District Manager rejected Bosley's right-of-way application because although the area applied for had been reduced from 750 to 240 acres, Bosley had failed to provide an "additional payment" of \$1,000 in processing fees. He also stated that Bosley had failed to provide timely the "level of detailed, site-specific data needed to properly assess the potential impacts of his wind farm proposal," in accordance with 43 CFR 2802.3(a) and (b).

On December 4, 1985, Bosley filed a timely notice of appeal from the District Manager's October 1985 decision. The case file with respect to CA-17631 was transmitted to the Board and the case docketed as IBLA 86-322.

Resolution of IBLA 86-321

[1] Under 43 CFR 4.410(a), any party to a case who is adversely affected by a decision of an officer of BLM has the right to appeal to the Board. There are three important elements to that regulation which must be present in order for a person to exercise the right of appeal -- (1) the person must be a "party to a case," (2) the person must be "adversely affected," and (3) there must be a "decision" by BLM. See Mark S. Altman, 93 IBLA 265 (1986); Oregon Natural Resources Council, 78 IBLA 124 (1983). The decision must constitute final action for BLM in order to be appealable; an interlocutory decision is not appealable. Randall Gerlach, 90 IBLA 338 (1986); Fortune Oil Co., 71 IBLA 153 (1983).

The only document filed in this case purporting to be a notice of appeal was Bosley's August 15, 1985, letter received by BLM on August 22, 1985. Presumably that letter was filed in response to the NORA published in the Federal Register on July 2, 1985. The NORA was not a final decision by BLM; it was not even an interlocutory decision. It was a notice to the world of action contemplated by BLM, i.e., the direct sale of, inter alia, parcel No. SD-7. Therefore, when Bosley filed his "appeal" on August 22, 1985, there was no decision on the sale from which an appeal would lie.

If the letter which represented that it was, in fact, an "appeal", was not an appeal, what was it? Under 43 CFR 4.450-2, any objection to any action proposed to be taken by BLM is a protest. As we have stated on numerous occasions, a document which contains the word "appeal" may be a protest, and vice versa. Howard H. Vinson, 90 IBLA 280, 282 (1986); Santa Fe Pacific Railroad Co., 90 IBLA 200, 205 (1986); California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977).

In this case Bosley's August 22, 1985, letter must be considered as a protest, since it represented an objection to an action (direct sale of parcel No. SD-7) which had not taken place. See George Schultz, 94 IBLA 173, 177

(1983). The rationale for treating such objections as protests was set forth by the Board in California Association of Four Wheel Drive Clubs, *supra* at 385, where the Board stated:

[W]hen an individual appears for the first time to object to proposed actions, treatment of this person's objections as an "appeal" effectively forecloses any consideration by the local authorized officer of the merits of the objection, since this Board has consistently held that upon the filing of a notice of appeal the State office loses all jurisdiction over the matter being appealed. In this * * * situation, the Board is, in effect, forced to make an initial decision, even though it is vested with appellate authority. [Emphasis in original.]

[2] BLM acted properly on September 4, 1985, when it, in effect, adjudicated Bosley's letter as a protest. We have stated that where a protest contains merely conclusory allegations that indicate no basis for changing the proposed action, BLM may summarily dismiss the protest. Phillip A. Kulin, 53 IBLA 57 (1981). Herein, Bosley's letter did not even contain a conclusory allegation. He did not provide any reason for his "appeal" of the direct sale. Although he had, at the time, a right-of-way application pending for some of the same land, he did not so state in his letter.

BLM provided an appropriate response. It informed Bosley of the deficiency of his letter; that he had provided nothing to cause it to change its position regarding the sale; and that he was welcome to file substantive comments. Bosley did not take advantage of BLM's invitation nor did he file an appeal of BLM's determination of his protest. While it could be argued that BLM's September 4, 1985, response to Bosley's protest was inadequate because it did not provide Bosley with a right of appeal, under the circumstances, we find it was adequate. Bosley provided absolutely no rationale for his objection to the sale. To provide him a right of appeal would have allowed him to raise his objections in the first instance before this Board. Such a procedure would frustrate the framework for decisionmaking outlined in California Association of Four Wheel Drive Clubs, *supra*, and place the Board in the position of being the initial decisionmaker concerning Bosley's objections.

BLM informed Bosley that he could provide the State Office with substantive comments. If he had filed such comments opposing the sale prior to the sale, BLM would have been obligated to adjudicate them as a protest, including in the decision thereon an appeals paragraph. Nevertheless, following denial of his right-of-way application, out of an abundance of caution, and because Bosley had filed the letter in August 1985 indicating it was an "appeal," BLM forwarded the case file to the Board.

We conclude for the above-stated reasons that the "appeal" must be dismissed. Bosley did not appeal any final action by BLM. The only document

purporting to initiate an "appeal" related to action proposed to be taken and was properly treated by BLM as a protest. 7/

The statement of reasons filed by Bosley in support of this "appeal," in essence, represents his objections to the proposed sale which he should have provided to BLM as part of his protest. Even if those reasons had been presented to the Board in support of a proper appeal of the sale, they would not support overturning BLM's action. Although not necessary for the disposition of this appeal, we will review those objections.

Bosley's principal objection to the sale focuses on the fact that it would be by direct sale, rather than by competitive bidding. He refers to a number of parties, in addition to himself, who might have been interested in bidding on the parcel, namely, Evelyn Walker, an adjacent landowner, unnamed mining claimants, and the San Diego Gas and Electric Company, which has a powerline running through the parcel.

[3] Section 203(f) of FLPMA provides that sales of public lands shall be conducted using "competitive bidding procedures." 43 U.S.C. § 1713(f) (1982). See Dean M. Anderson, 94 IBLA 88, 91 (1986). However, that statutory section further provides that land may be sold with modified competitive bidding or without competitive bidding "where the Secretary determines it necessary and proper in order * * * to recognize equitable considerations or public policies, including but not limited to, a preference to users." 8/ 43 U.S.C. § 1713(f) (1982). Finally, the section concludes that "[i]n recognizing public policies, the Secretary shall give consideration to the following potential purchasers: * * * adjoining landowners." Id.

The "policy for selecting the method of sale" from among the three methods provided for in the statute is set forth at 43 CFR 2710.0-6(c)(3). That policy provides that competitive bidding

may be used where there would be a number of interested parties bidding for the lands and (A) wherever in the judgment of the authorized officer the lands are accessible and usable regardless of adjoining land ownership and (B) wherever the lands are within

7/ On Dec. 26, 1985, prior to receipt of the case file for CA 17303, the Board received a letter from Bosley which stated: "If I have not done so, this is a notice of appeal for * * * CA 17303." He did not represent what "decision" for CA 17303 was being appealed. Whatever "decision" concerning CA 17303 it may have related to, the record indicates the notice clearly was untimely. It was not filed "within 30 days after the date of service," as required by 43 CFR 4.411(a). Such an appeal would have to be dismissed. TCG May 1983, 94 IBLA 22 (1986); Ilean Landis, 49 IBLA 59 (1980).

8/ Bosley argues that the statute requires that the Secretary himself make the statutory determination, rather than BLM. He ignores, however, that the determination has been delegated to BLM under applicable regulations. 43 CFR Part 2710; see 43 CFR 2711.3-2(a) and 2711.3-3(a).

a developing or urbanizing area and land values are increasing due to their location and interest on the competitive market.

43 CFR 2710.0-6(c)(3)(i). Bosley, however, has not established that these competitive sale criteria were met in the present case. First, he has not shown that there would be a "number of interested parties bidding for the lands." *Id.* The record does contain a letter from Evelyn Walker dated July 29, 1985, in part objecting to a sale to Haagen. She stated that the "Wrights" would have tendered the "purchase price for the land, but they were not even given a chance to make an offer." ^{9/} BLM responded to her concerns by letter dated August 5, 1985, explaining the rationale for the direct sale. There is no further evidence in the file of communication between Walker and BLM concerning the sale. Second, Bosley has not shown that the parcel is accessible and usable or that it is in a developing or urbanizing area.

Modified competitive bidding, on the other hand, may be used so as to allow the "existing grazing user or adjoining landowner" to meet the high bid at a public sale. 43 CFR 2710.0-6(c)(3)(ii). This method of sale may, thus, "protect on-going uses, * * * assure compatibility of the possible uses with adjacent lands, and avoid dislocation of existing users." *Id.* However, modified competitive bidding may take other forms. *See* 43 CFR 2711.3-2(a)(1). In any case, factors that must be considered in deciding whether to use modified competitive bidding include "[n]eeds of State and/or local government, adjoining landowners, historical users, and other needs for the tract." 43 CFR 2711.3-2(a)(2). By contrast, direct sales may be used

when the lands offered for sale are completely surrounded by lands in one ownership with no public access, or where the lands are needed by State or local governments or non-profit corporations, or where necessary to protect existing equities in the lands or resolve inadvertent unauthorized use or occupancy of said lands. [^{10/}]

43 CFR 2710.0-6(c)(3)(iii).

^{9/} It is not clear from the record who the "Wrights" are. Also, interest on the part of mining claimants or the San Diego Gas and Electric Company may have been obviated by the fact that the patent of parcel No. SD-7 was to be made subject to the mining claims and the company's powerline right-of-way. *See* 50 FR 27366 (July 2, 1985).

^{10/} Examples of those situations where direct sales are appropriate are also set forth at 43 CFR 2711.3-3(a):

"(1) A tract identified for transfer to State or local government or nonprofit organization; or

(2) A tract identified for sale that is an integral part of a project of public importance and speculative bidding would jeopardize a timely completion and economic viability of the project; or

As noted supra, the attachment to the EA states that direct sale of parcel No. SD-7 and the other parcels was chosen "after considering historic and current land uses of the area; valid, existing rights or encumbrances of record, i.e., mining claims and grazing leases; land ownership patterns and access to these parcels of public land." That document further explains that the proposed direct purchasers "either own all or most of the private property around these sale parcels or control legal access to them over existing roads."

Bosley asserts that Haagen's private land borders only "about a third of the Rattlesnake Mountain parcel" (Statement of Reasons (SOR) (IBLA 86-321) at 6). He submitted a map on appeal in support of that assertion (Item 1 at 2). 11/ In addition, Bosley contends that there are "many public accesses to the parcel." Id. Bosley's map indicates the "Tierra Del Sol Road" approaches parcel No. SD-7 from the western side. 12/ It is unclear whether this road provides public access. However, a January 17, 1986, letter to Bosley from the Indio Resource Area Manager, BLM, contradicts Bosley's claim of public access (SOR (IBLA 86-322) at Item 2). Therein, the Area Manager states that the parcel is "surrounded by private land and the Mexican border." He advised Bosley that "public access for casual use can legally be gained with the permission of land owners to cross the private land between one of the public roads and public land."

Thus, the record shows lack of public access. On the other hand, it is clear the land is not surrounded by land in one ownership. Nevertheless, the regulations allow direct sales where "necessary to protect existing equities." 43 CFR 2710.0-6(c)(3)(iii). In its August 5, 1985, response to Walker, BLM explained that its decision to offer parcel No. SD-7 for direct sale was based on the fact that Haagen was an adjoining owner and that he held a grazing lease for the subject land. 13/

fn. 10 (continued)

(3) There is a need to recognize an authorized use such as an existing business which could suffer a substantial economic loss if the tract were purchased by other than the authorized user; or

(4) The adjoining ownership pattern and access indicate a direct sale is appropriate; or

(5) A need to resolve inadvertent unauthorized use or occupancy of the lands."

11/ The map depicts parcel No. SD-7 and allegedly the adjacent private land owned by Haagen. This map indicates that Haagen owns much of the land which borders the northern and eastern boundaries of parcel No. SD-7.

12/ The Appraisal Report, at page 15, states that the "nearest paved road for partial physical access is 'Terra Del So' with the remainder being private jeep trails from the east side."

13/ Although in his April 1985 letter to BLM, Haagen stated that parcel No. SD-7 and another parcel were "intricately necessary" for his continuing grazing operations, we note that a September 23, 1985, letter from BLM to Senator Pete Wilson described the land as "not developable but * * * a steep, rugged, boulder-strewn ridge which has only a few useable acres even for a cattle grazing operation."

Bosley has overlooked the fact that a direct sale may be invoked in the interest of according a "preference to users." 43 U.S.C. § 1713(f) (1982). There is no question that Haagen has held a grazing lease to parcel No. SD-7 since the "mid seventies" (SOR at 2). While modified competitive bidding may be used in the case of an "existing grazing user or adjoining landowner" (see Richard D. and Virginia Troon, 93 IBLA 256 (1986); Luther D. Moss, 89 IBLA 171 (1985)), the regulations do not preclude BLM from invoking a direct sale, even where there are other adjacent landowners. Thus, BLM's decision to recognize Haagen's existing use by directly selling parcel No. SD-7 to him is not violative of either section 203(f) of FLPMA or its implementing regulations.

Bosley also argues that the decision to sell parcel No. SD-7 did not consider the concept of multiple use. Multiple-use management of public lands is one of the declared policies of FLPMA. See 43 U.S.C. § 1701(a)(7) (1982). However, it is also a policy that public land may be disposed of where it will "serve the national interest." 43 U.S.C. § 1701(a)(1)(1982). In accordance with this, section 203(a) of FLPMA sets forth the necessary criteria for disposal, including where it is determined that a tract of land "because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency." 43 U.S.C. § 1713(a) (1982). A determination to that effect was made in the present case. See 50 FR 27366 (July 2, 1985). Bosley has not shown that determination was in error.

Finally, Bosley contends that BLM afforded inadequate public notice under 43 CFR 2711.1-2 of the sale of parcel No. SD-7. We disagree. Publication in the Federal Register and the Daily Californian fully complied with 43 CFR 2711.1-2(c). In addition, the record indicates that copies of the June 1985 notice of the sale were sent to "known interested parties of record," in accordance with 43 CFR 2711.1-2(b). These parties are contained on a list attached to a July 2, 1985, letter from the BLM Project Area Manager, addressed "Dear Interested Citizen." Bosley refers to a number of parties who were not so notified. However, he has failed to establish that the identified parties were "known interested parties of record" under 43 CFR 2711.1-2(b) to whom notice should have been sent.

We conclude that Bosley's objections to the sale would not support overturning the sale.

Resolution of IBLA 86-322

We, therefore, turn to Bosley's appeal of the District Manager's October 1985 decision rejecting his wind farm right-of-way application because he failed timely to pay the necessary processing fee and provide required information. In essence, BLM concluded that Bosley had not been responsive to its August 1985 interlocutory decision.

Under 43 CFR 2802.3(a), various information is required as part of a right-of-way application. That information is the name and address of the applicant, a description of the applicant's proposal, a map showing the

approximate location of the proposed right-of-way and facilities on public lands, a statement of the applicant's technical and financial capability, and an appropriate certification. ^{14/} In its August 14, 1985 decision, BLM held Bosley's application "in abeyance" because additional processing fees were required and because BLM considered the application to be "incomplete." BLM cited certain subsections under 43 CFR 2802.3 in support of specific requested items of information. It also informed Bosley that failure to comply with its requests would result in rejection of his application.

Bosley submitted additional information on September 17, 1985. Because of the failure to include the necessary processing fee and the inadequacy of the submission, BLM rejected Bosley's right-of-way application. ^{15/}

[4] The regulation governing requests for further information in support of a right-of-way application provides as follows:

(c) The authorized officer may require the applicant for a right-of-way grant to submit such additional information as he deems necessary for review of the application. All requests for additional information shall be in writing. Where the authorized officer determines that the information supplied by the applicant is incomplete or does not conform to the act or these regulations, the authorized officer shall notify the applicant of these deficiencies and afford the applicant an opportunity to file a correction. Where a deficiency notice has not been adequately complied with, the authorized officer may reject the application or notify the applicant of the continuing deficiency and afford the applicant an opportunity to file a correction.

It appears from this regulation that the authorized officer may require an applicant to submit additional information in support of the application,

^{14/} In addition, 43 CFR 2802.3(b) provides that an applicant "may" submit additional information including required State "approvals," a description of alternatives considered by the applicant, a "statement of need and economic feasibility" and a "statement of environmental, social and economic effects of the proposal."

^{15/} Bosley attributes deficiencies in his submission of additional information to the fact that BLM actively discouraged appellant from going on Rattlesnake Mountain to collect data. Appellant states that a BLM realty specialist told him "not [to] go on Rattlesnake Mountain as Mr. Haagen's people would cause me bodily harm. I couldn't get my engineering and planning contractors to go on the site after he threaten[ed] them" (SOR (IBLA 86-322) at 1). The authorization for a prospective applicant to go on public lands "to perform casual acts related to data collection necessary for the filing of an acceptable application" is set forth at 43 CFR 2802.1(d). This authorization continues with respect to data collection "necessary to perfect the application." 43 CFR 2802.4(b). Thus, any BLM action taken to prevent or discourage authorized "casual acts" would be contrary to Departmental regulation. We need not determine the truth of Bosley's allegation, given our disposition of this appeal.

and if the authorized officer determines that the submitted information is incomplete or is not in conformance with the act or regulation, he or she must issue a deficiency notice. However, the regulation does not require that the authorized officer request additional information prior to issuance of a deficiency notice. Although BLM's decision dated August 14, 1985, is not styled as a deficiency notice, it did inform Bosley that BLM considered his application to be "incomplete." It also apprised him of the deficiencies in his application and provided him an opportunity to correct them. Further, while the regulation allows the authorized officer to provide the applicant with additional time to correct, if the response to the deficiency notice is insufficient, it also provides that in such a circumstance the authorized officer may reject the application. In its August 14, 1985, decision, BLM notified Bosley that failure to comply with its requests would result in rejection of the application.

We cannot fault BLM's procedure in this case. It provided Bosley with written notice of the deficiencies of his application, provided him with an opportunity to comply, and informed him of what the consequences of a failure to comply would be.

We must determine, however, whether rejection was proper. BLM's principal ground for a rejection was that Bosley failed to pay the appropriate processing fees as established by 43 CFR 2803.1-1(a)(3). That regulation provides:

(3) An applicant shall submit with each application a nonreturnable payment in accordance with the following schedule:

(i) Each right-of-way grant or temporary use permit for crossing public lands (e.g., for powerlines, pipelines, roads and other linear uses).

Length	Payment
Less than 5 miles	\$50 per mile or fraction there-of
5 to 20 miles	\$500
20 miles and over	\$500 for each 20 miles or fraction thereof.

(ii) Each right-of-way grant or temporary use permit for non-linear uses (e.g., for communication sites, reservoir sites, plant sites, and camp sites) - \$250 for each 40 acres or fraction thereof.

BLM stated in its August 1985 decision that Bosley's application covered 750 acres and that applying the non-linear regulation (43 CFR 2803.1-1(a)(3)(ii)), \$4750 in processing fees were required. Since Bosley paid \$500 with his application, BLM explained that his payment was deficient in the amount of \$4250. In his September 17, 1985, response Bosley stated:

I have modified my original plot plan from many miles of far spaced wind turbines to one row of closely spaced wind turbines located in the strongest wind. BLM mistook these rows as an area right-of-way instead of linear. Since this modification my application fee is several hundred dollars too much.

In rejecting Bosley's application BLM did not address his contention that he was seeking a linear right-of-way. Rather, BLM stated that Bosley had reduced the requested acreage from approximately 750 acres to 240 acres, and that processing a non-linear right-of-way application for the reduced acreage would still require an additional payment of \$1,000.

On appeal, Bosley reasserts his claims that the right-of-way sought was linear in nature and that his payment was adequate.

[5] The question of what Bosley was required to pay at the time he submitted his application, thus, turns on whether he was seeking a right-of-way for a linear or non-linear use. Aside from examples, Departmental regulations do not specifically define the difference between linear and non-linear uses. ^{16/} However, the difference is apparent from the examples given and from the fact that linear uses are restricted to those uses which are sought for "crossing public lands." Linear rights-of-way are sought for the purpose of transportation, so that, e.g., electricity in a powerline, oil or gas in a pipeline, or vehicles on a road may be transported or may travel across the public lands in a narrowly defined corridor. On the other hand, Bosley has requested a right-of-way for a "wind farm." The main component of the proposed wind farm is a series of wind turbines. In addition, Bosley seeks an area for a 69 KV substation and a maintenance building. Bosley's proposal has linear elements, yet the requested right-of-way, as a whole, must be considered to be non-linear. ^{17/} Although the wind turbines were proposed to cover a small area several miles long, each turbine would be individually sited and not all turbines would have to operate in order for the "farm" to produce electrical power. We find that Bosley's processing fee requirement was governed by 43 CFR 2803.1-1(a)(3)(ii).

Even though he scaled back his original proposed right-of-way, the reduced total acreage (240 acres) still required that an additional payment be made. Because Bosley failed to pay additional fees, we conclude that BLM properly rejected appellant's right-of-way application. ^{18/} BLM correctly

^{16/} As set forth above, 43 CFR 2803.1-1(a)(3)(i) cites "powerlines, pipelines, [and] roads" as examples of linear uses; whereas 43 CFR 2803.1-1(a)(3)(ii) cites "communication sites, reservoir sites, plant sites, and camp sites" as examples of non-linear uses.

^{17/} Appellant's amendment of his right-of-way application decreased the number and areal placement of wind turbines, but did not change the nature of the proposed right-of-way from non-linear to linear.

^{18/} Bosley alleges on appeal that the right-of-way would be "under about 200 feet" in width and that, based on his calculations, he had paid "enough," even under 43 CFR 2803.1-1(a)(3)(ii). That purported width is not borne out by the map filed with BLM on Sept. 17, 1985.

informed Bosley that its August 1985 decision was interlocutory; therefore, his option, if he objected to BLM's August 1985 decision requiring an additional payment, was to pay under protest and pursue his objections through BLM and ultimately to the Board. See Smart & Co., 79 IBLA 323, 327 (1984). By simply objecting, Bosley foreclosed any further opportunity to comply with the payment requirement when BLM overruled that objection. Likewise, affirmation of the BLM decision precludes that opportunity. See Carl Gerard, 70 IBLA 343, 346 n.2 (1983). BLM is not required to afford innumerable opportunities to a right-of-way applicant to make the payment required by 43 CFR 2803.1-1(a)(3)(ii) at the time of filing an application.

Accordingly, we conclude that the District Manager, in his October 1985 decision, properly rejected appellant's right-of-way application CA-17631 for failure to make proper payment. 19/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the "appeal" docketed as IBLA 86-321 is dismissed, and the decision appealed in IBLA 86-322 is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

John H. Kelly
Administrative Judge

19/ We need not determine whether the information submitted by Bosley was adequate to allow processing of the application.

